

Contract Law Theory and Ethical Considerations

This reading provides examples; discriminate between statutory, regulatory, and ethical restrictions applicable to government contracts.

Objectives

1. Organizational Conflicts of Interests: Recognize the types of contractor activity, which create such a conflict of interests as to preclude a specific contract award.
2. Procurement Integrity - identify the major components/premises of the Procurement Integrity Act.
3. Individual Conflicts of Interests: Determine when a legally proscribed individual conflict of interests exists and the impact such a conflict has on the contracting officer.

Constitutional Principles of Separation of Powers

The basic principles on which American law is based are set forth in the U.S. and individual state constitutions. The law is found primarily in statutes, regulations, and case decisions, which originate from an overlapping system of federal, state, county and municipal jurisdictions. Law developed by judges in cases and not governed by statutes makes up a large part of this "body of law," and is referred to as "common law." These terms will be discussed later in this chapter, but we must begin with the U.S. Constitution.

The document emanating from the Philadelphia Convention of 1787, ratified by State conventions and chosen by the people, is called the Federal Constitution. Together with later amendments, this Constitution established the basic legal relationships, which characterize our form of Government. The most fundamental concept contained in the Constitution is the principle of separation of governmental powers; Chief Justice Taft expressed it in the case of *Ex parte Grossman* as follows:

The Federal Constitution nowhere expressly declares that the branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing for them and their courts an independence of Congress and the executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the constitution and the normal operation of Government under it easily demonstrate. By affirmative action through the veto power, the executive and one more than one-third of either House may defeat all legislation. One half of the

House and two-thirds of the Senate may impeach and remove the members of the judiciary. The executive can reprieve or pardon all offenses after their commission, either

before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.

Negatively one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed. [Ex parte Grossman, 267 U.S. 87, 119 (1925).]

These are some examples of positive and negative restraints made available by the Constitution to each branch of the Government in defeat of the actions of the others. They show that although each of the three branches is independent, the intended functioning of the Government requires a measure of cooperation among the branches. Indeed, while the Constitution has made the judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look to the force of public opinion for support in the face of reluctance of either of the other branches to enforce its will.

From this point of view, each of the three branches of Government balances the others and this system of checks and balances is designed to prevent abuse of power by anyone branch. In a sense, therefore, the Constitution creates powers and distributes them among the three branches of Government, while at the same time imposing limitations on each branch to induce cooperation with the others.

General Concept of Delegation of Power

Whether a power can be legally delegated often depends on the terms of the Constitution itself. Some powers cannot be delegated because they are granted to a specific person in the Constitution. For example, only Congress can declare war, because the Constitution specifically assigns this power to Congress as a legislative function. But where a power is not specifically assigned, and where it logically appears that it would be impossible for the holder of the power to exercise the power personally, delegation is not only permitted but necessary. Generally, however, final responsibility for the exercise of the power or the duty, as the case may be, must remain with the one initially charged with the responsibility. Historically, whether a power was properly delegated depended upon the presence of a standard or prescribed formula to guide the person to whom it was delegated. More recently it has been recognized that a proper delegation can allow greater discretion in exercising the delegated power. "In order to avoid an unconstitutional delegation of power, it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the problem." (*Lichterv. U.S.*, 334 U.S. 742 (1947)).

Executive Branch - Article II of the Federal Constitution is often referred to as the "Executive Article." It states in Section 1, "The Executive Power shall be vested in a President of the United States of America." The executive power is given in general

terms and certain limitations are specified. With the exception of the field of foreign affairs, where the President is said to have inherent power, the powers of the Chief Executive are enumerated in Sections 2 and 3:

- He is Commander-in-Chief of the Army and Navy of the United States and the Militia of the various states when called to actual service.
- He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their offices.
- He has the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.
- He has the power to make treaties with the advice and consent of the Senate, provided that two-thirds of the Senators present concur.
- He nominates and appoints (with the advice and consent of the Senate) ambassadors, other public ministers and consuls, Supreme Court Justices, and all other officers of the United States (except that Congress can in some instances authorize the courts or other officials to make appointments).
- He may fill vacancies that occur during the recess of the Senate (such appointments expire at the end of the next session).
- He may, on extraordinary occasions, convene one or both Houses and in the case of disagreement with respect to time of adjournment, he may adjourn them to such time, as he shall think proper.
- He receives ambassadors and other public ministers.
- He commissions all officers of the United States.

In addition to the above powers, the President has the following duties:

- He shall take care that the laws be faithfully executed.
- He shall from time to time give to the Congress information of the State of the Union.
- He shall recommend to Congress such measures, as he shall judge necessary and expedient.

Presidential Delegation - Very early in our history, it was recognized by the judicial branch of the Government that it would be literally impossible for the President to effectuate or superintend every power or duty that he possessed either expressly or implicitly. In *Williams v. United States*, 1 How 290 (1843), Justice Daniel speaking for the court stated, "The President's duty in general requires his superintendent of the administration, yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to such services, which nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform." The first agencies to be created were the cabinet posts approved by President Washington. As the Government became more complex and demanding, it was necessary to expand agency development in both the executive area of responsibility and in its legislative counterpart. This has resulted in the existence of hundreds of agencies and sub agencies in Government today.

In the executive branch of the Government there are departments, agencies, and

offices, which are responsible to the executive. These instrumentalities are the agencies through which the President discharges the responsibilities of his office. While it is neither feasible nor prudent to discuss all of the numerous agencies at great length, a few of the more important ones will be briefly touched upon at this point.

The Executive Office of the President consists of a number of offices, councils and advisory boards created to assist the President in carrying out his functions by providing services and advice:

- The White House Office is staffed by special assistants who serve the President in the performance of the many detailed activities. Many of these assistants are personal aides and are specialists in fields in which the President wishes and needs to be informed.
- The Office of Management and Budget performs many services, the majority of which relate to the responsibility that the President has under the Budget and Accounting Act to transmit to Congress the proposed annual budget of the United States. In addition, that office serves as the Government's budget agency and plans and promotes improvement, development, and coordination of Federal and other statistical agencies.
- The Council of Economic Advisors analyzes the Nation's economy, advises the President on economic developments, and recommends to the President policies for economic growth and stability.
- The National Security Council functions to advise the President on the integration of domestic, foreign and military policies relating to national security. It includes the Vice President, Secretary of State, and Secretary of Defense, and is advised by the Director of the Central Intelligence Agency and the Chairman of the Joint Chiefs of Staff.
- The Office of Science and Technology Policy advises and assists the President in developing policies to coordinate programs to use science and technology most effectively.
- The Office of the United States Trade Representative administers overall trade policy.
- The Council on Environmental Quality formulates and recommends national policies to promote the improvement of the quality of the environment.
- The Office of Policy Development, established in 1977, formulates and coordinates recommendations made to the President on domestic policy.
- The Office of Administration provides administrative support services to all units within the Executive Office of the President.

The Cabinet, which consists of thirteen executive departments, advises the President on the many matters which he, is expected to superintend as the Chief Executive. The executive departments of the Cabinet are as follows: Department of State; Department of Treasury; Department of Defense; Department of Justice; Department of the Interior; Department of Agriculture; Department of Commerce; Department of Labor; Department of Health and Human Services; Department of Housing and Urban Development; Department of Transportation; Department of Energy; and Department of Education.

Many "independent" agencies tend to function for the benefit of other agencies or

other activities not so closely associated with Presidential functions. Some of these independent agencies are listed below.

- The General Services Administration manages Government property records, and provides systems for procurement and distribution of supplies.
- The Nuclear Regulatory Commission develops national policy for generation, use, and control of atomic energy.
- The National Aeronautics and Space Administration assists in implementing the policy that activities in space be devoted to peaceful purposes.
- The Small Business Administration promotes the development of small businesses.

In terms of Government contracting, the most important executive department is the Department of Defense. Within this Department are the Secretary of Defense, the Deputy Secretary of Defense, and the Under Secretary of Defense for Acquisition (and Deputy), the Defense Staff Offices, the Joint Chiefs of Staff, the three military departments and the military services within those departments, the unified and specified commands, and other Department of Defense agencies. The Secretary of Defense is the principal assistant to the President in matters relating to the Department of Defense. The Department contains a number of Assistant Secretaries in special functional fields. The Under Secretary for Acquisition has responsibility to coordinate and improve acquisition by the Department of Defense.

The National Security Act, as amended in 1949, established the Department of Defense as an executive department, and at the same time designated the Department of the Army, the Department of the Navy and the Department of the Air Force as military departments within the Department of Defense. Each of the military departments is headed by a Secretary who is subject to the direction, authority and control of the President as Commander-in-Chief and of the Secretary of Defense. Each Secretary of a military department is a member of the Armed Forces Policy Council, which functions as an advisory body to the Secretary of Defense on matters of broad policy relating to the armed forces.

Each of the military departments within the Department of Defense has an organization responsible for procurement. In the Department of the Army, the Assistant Secretary (Research, Development and Acquisition) is authorized and directed to act for the Secretary of the Army in the field of procurement and production. In the Department of the Navy, the Assistant Secretary of the Navy (Shipbuilding and Logistics), the Office of Naval Acquisition Support (ONAS) and the Executive Director for Contracts and Business Management are responsible for providing material support to the operating forces of the Navy. In the Department of the Air Force, the Assistant Secretary of the Air Force (Research, Development, and Logistics) is responsible for the direction, guidance and supervision of procurement activities. Procurement authority has been delegated to the Office of Aerospace Research and all of the major commands. However, the bulk of USAF procurement is done by the Air Force Materiel Command for the acquisition of weapon systems and for the support of those systems when they become operational.

In addition to the procurement organizations of the military departments, the Department of Defense has, as an integral part of its organization, the Defense Logistics Agency. This Agency functions to provide logistical services directly associated with supply management activities and other support services as directed by the Secretary of Defense.

Civilian Agency Procurement - Most civilian agencies engage in some procurement peculiar to the function or mission of the agency.

Easily the most important civilian agency procurement function is that of the General Services Administration (GSA) - the central supply agency of the Federal Government. It procures the items common to more than one agency. such as office equipment, computer services, automobiles, etc. Under the Federal Property and Administrative Services Act of 1949, it governs (1) procurement, supply and maintenance of real and personal property and non personal services; (2) promotion of utilization of excess property; (3) disposal of domestic surplus property; and (4) sound records management. To accomplish these functions it operates the Office of National Archives and Records Service, the Office of Federal Supply and Services, the Federal Property Resources Service, the Public Buildings Service and the Office of Information Resources Management. GSA operates regional offices to carry out its mandates, especially procurement and property disposal.

Although DOD and GSA dominate federal procurement, other agencies issue procurement regulations to govern their own purchases, supplemental to the Federal Acquisition Regulation (FAR).

Legislative Branch - The legislative branch of the Government is often referred to as the law-making branch. This body, divided into several offices, exercises certain powers that are provided by the Constitution.

Legislative Powers - Article I of the Constitution, called the Legislative Article, grants to Congress "all legislative powers" of the Federal Government. The various sections of Article I provide for the creation of the two houses of Congress grant express powers (Section 8) and impose limitations on the exercise of power (Section 9). In Section 8, the Congress is given powers, which may be implemented only through legislation. Clauses 1 through 10 of this section give Congress the power to regulate commerce, establish laws for maintenance of a monetary system, establish postal systems, promote science and useful arts, provide for courts lower than the Supreme Court, and to punish crimes committed on the high seas. Clauses 11 through 16 are the War clauses and consist of the following powers:

To declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To Raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulations of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress

Insurrections and repel Invasions; To provide for organizing, arming and disciplining the Militia, and for governing such Part of them as may be employed in the service of the United States...

Clause 17 provides for the District of Columbia to be the seat of Government, and Clause 18 broadly gives the Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As in the case of the executive branch, the legislative branch finds it necessary to delegate many of the functions expressly and implicitly granted by the Constitution. To facilitate the discharge of its responsibilities, Congress has created the numerous agencies, which characterize today's governmental system.

Legislative Departments - Within the legislative branch itself there are several offices created by acts of Congress. The most important of these offices, in terms of Government contracts, is the General Accounting Office (GAO). This Office was created by the Budget and Accounting Act of 1921, and its functions and activities have been broadened and extended by subsequent amendments. The primary purpose of this office is to assist the Congress in providing legislative control over the receipt, disbursement and application of public funds. It operates principally in the fields of auditing, accounting, claims settlement, legal decisions and records management. The GAO is under the direction of the Comptroller General of the United States. The Comptroller General is appointed by the President with the advice and consent of the Senate for a term of 15 years, but can be removed from office only by the Congress. This office reports to the Congress and publishes the decisions it renders concerning the legality of expenditures of public funds. (Under some circumstances, Contracting Officers may request advance decisions on questions involving the awarding of a contract. In addition, any bidder may request a decision on the legality of a proposed or actual award of a contract adversely affecting him. 31 USC § 3529). Other important offices added to the legislative branch in recent years include the Congressional Budget Office and the Office of Technology Assessment.

Judicial Branch - The third branch of the Government is the judicial branch. The Constitution provides for the establishment of the Supreme Court and lower courts. The judiciary's role as interpreter of the law was established in the famous case of *Marbury v. Madison*.

Jurisdiction - Article III, Section 1 of the Constitution of the United States provides that "The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," The Judiciary Act of 1789 created the Supreme Court of the United States in accordance with this constitutional provision. Section 2 of Article III provides that "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be

a Party; to Controversies between two or more States; between a State and Citizens of another State [except as provided by the eleventh amendment]; between Citizens of : different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The Constitution then proceeds to designate the "original" jurisdiction of the Supreme Court (i.e., when a law suit may originate in the Supreme Court) as extending to all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases in which the Supreme Court has jurisdiction, such jurisdiction is appellate.

The Constitution grants Congress the power to create courts lower than the Supreme Court, and at various times in the history of the United States, Congress has in fact created such courts as the need became apparent. Immediately below the Supreme Court in the Federal Court System are the United States Courts of Appeals. The United States is divided into 13.Judicial circuits, which includes the Court of Appeals for the Federal Circuit, and in each of these circuits there is a Circuit Court of Appeals. The purpose of the Courts of Appeals is to relieve the Supreme Court from having to consider all appeals in cases originally decided by Federal trial courts. These appellate courts also may review final decisions of many Federal administrative bodies. The decision of a United States Court of Appeals is final except that it is subject to review by the Supreme Court.

The U.S. District Courts are the general trial courts in the Federal Court System. Each state has at least one district court and many have more than one. There are 104 district courts. Decisions of the district courts may be appealed to the Circuit Courts of Appeals. Since the passage of the Contract Disputes Act of 1978, Government contract disputes are no longer heard by district courts. The only exceptions are cases arising out of contracts of the Tennessee Valley Authority (TV A). However, the Administrative Dispute Resolution Act of 1996 gave District Courts and the Court of Federal Claims concurrent jurisdiction to hear "protest" actions related to the award of Federal government contracts.

In addition to these courts of "general jurisdiction," Congress has created various specialized courts. The United States Court of Claims (established in 1855) was reestablished in March 1982 as the United States Claims Court, and in 1992 its name changed again to the United States Court of Federal Claims. Its original jurisdiction extends to any claim against the United States founded upon the Constitution, upon any act of Congress, upon any regulation of an executive department, or upon any express or implied contract with the United States. Another example is the United States Court of Military Appeals, which is an appellate tribunal in court-martial convictions. This court is judicially independent although it operates as a part of the Department of Defense for administrative purposes. Appeals from this court may be taken to the United States Supreme Court.

Administration of United States Courts - The Administrative Office of the United States Courts functions as the administrative office for all Federal Courts. It is responsible for the supervision of all matters relating to clerical and administrative

personnel and for statistical data relating to the operations of the Federal courts.

Sources of Procurement Law

The following sources are of particular importance in the area of Government procurement law. All are subordinate to the U.S. Constitution, as previously discussed.

Statutes - Acts of Congress are codified under general topics in the United States Code (*U.S.C.*). For example, those laws relating specifically to the armed forces are found in Title 10 of the Code; Title 18 focuses on Federal crimes; and some key statutes relating to public contracts are found in Title 41. References to the Code are by title and section number, e.g., 10 U.S.C. § 2304(a). Some Acts are not codified and are referred to only by their public law number and the number of the Congress which enacted them; e.g., Public Law 83-324 was enacted by the 83rd Congress in 1953 (its first session) or in 1954 (its second session); Public Law 84-324 would be enacted by the 84th Congress in 1955 or 1956; and so on. These uncoded Acts are generally appropriation acts, legislation too recent to have been published in the Code, or temporary laws.

Executive Orders - Administrative directives are issued by the President, frequently implementing authority provided by Congress. These orders are referred to by numbers and dates; e.g., Executive Order No. 9859, May 21, 1947.

Decisions - Some decisions made by the executive, legislative and judicial branches of the Government are given the force and effect of law. These decisions are published periodically for public information and are the largest body of Government contract law.

Administrative Agencies - Some of the agencies responsible for such Governmental decisions are:

Comptroller General - As the head of the General Accounting Office, the Comptroller General of the United States is the "watchdog" charged with making certain that appropriated funds are spent in accordance with the law. Since nearly all procurement involves appropriated funds, the Comptroller General's authority extends to nearly all areas of procurement law. He provides advisory rulings on *protests* (matters relating to the award of contracts). He usually does not rule on contract *disputes*, which by definition are related to contract performance or termination. Contract disputes are generally assigned by law to the Boards of Contract Appeals, the U.S. Court of Federal Claims, the Court of Appeals for the Federal Circuit, and the Supreme Court. The Comptroller General's more important decisions are published periodically in a set of books entitled "Decisions of the Comptroller General" These decisions are cited by referring to the volume and page number; e.g., 21 Compo Gen. 324. His unpublished decisions are referred to by their individual case numbers and dates.

Attorney General - The Attorney General of the United States renders opinions interpreting statutes governing procurement matters. They are published in a series of bound volumes entitled "Opinions of Attorney General" published from 1852 to date and

containing opinions from 1791. These are cited, for example, as 20 Ops. Atty. Gen. 105.

The Attorney General's opinions are advisory to the Executive Branch, and they are relied on by the Executive Branch, but they are not "decisions" because they are issued without hearing the arguments of actual adverse parties. Thus they do not purport to bind private parties. Nonetheless, members of the Executive Branch will generally comply with them, and the courts often find them persuasive.

Armed Services Board of Contract Appeals (ASBCA) - The Armed Services Board of Contract Appeals, established by charter within the department of Defense, is a single Board consisting of civilian attorneys. Its function is to decide contract disputes (usually relating to contract performance or termination) under the Contract Disputes Act of 1978. Civilian agency disputes are heard by similar boards in the various agencies. These boards furnish the greatest number of procurement law decisions, and their decisions are binding unless overturned by the Court of Appeals for the Federal Circuit or the U.S. Supreme Court.

Courts and Boards - Federal court decisions are published in bound form in one of several reporting series. Case citations are frequently found in case decisions and legal authority. Components of a standard federal case citation are the parties, volume, reporter (publication), start page, court, and year, e.g. *Hardaway Co. v. Corps of Engineers*, 980 F.2d 1415 (11th Cir. 1993). Citations for the Board of Contract Appeals are different and would appear as *Ordnance Devices, Inc.*, ASBCA No. 42709, 93-2 BCA ~25,794. For examples of the different forms of citation, see the list of cases in Volume 2.

Regulations

It is important to note that the decision-making processes of Government agencies are governed by regulations.

The Federal Acquisition Regulation - The Federal Acquisition Regulation (FAR) is the primary regulation for use by all Federal executive agencies in their acquisition of supplies and services with appropriated funds. The FAR system has been developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974, as amended by Pub. L. 96-83. The FAR is issued under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator for Federal Procurement Policy.

The FAR, together with agency supplemental regulations, replaced the Federal Procurement Regulations System, the Defense Acquisition Regulation, and the NASA Procurement Regulation as to new procurements on April 1, 1984. It precludes agency acquisition regulations that unnecessarily repeat, paraphrase, or otherwise restate the FAR and it limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency. The FAR is intended to provide for coordination, simplicity, and uniformity in the Federal acquisition process. The FAR

provides for agency and public participation in its development. Mandatory provisions of the FAR may have the force and effect of law. The well known case of *G. L. Christian and Associates v. United States*, 312 F.2d 418 (1963), held that the clause authorizing the Government to terminate a contract for its own convenience (without breaching the contract) was a part of the contract between the parties, even though the mandatory clause to that effect had not been included in the contract. Whether any particular provision of the FAR represents a significant "public procurement policy" and has the force and effect of law may be litigated separately. (See, e.g., *Rehabilitation Services of Northern Cal.*, 96-2 BCA 11 28324 ("Government Property" clause).

DoD FAR Supplement - The Department of Defense originally issued its agency regulations concurrently (April 1, 1984) with the FAR. It was key-numbered to the FAR for ease of use and thus gives direct access to implementing agency policy.

Procurement Regulations - Procurement regulations are not the same as normal regulations. Much of their content is for internal guidance only and is not required by public law or executive order. However, taken as a whole, procurement regulations do serve several important functions. First, they amass vast and complex legal requirements and policy into a single reference sources so procurement officials know how to structure, award and administer contracts. Second, they provide standard clauses that are applicable to all participants. Third, they control and guide procurement officials in the performance of their duties so that treatment of contractors is uniform and fair.

Office of Federal Procurement Policy (PFPP)

At the apex of procurement policy is the Office of Federal Procurement Policy, housed in the Office of Management and Budget, which in turn is within the Executive Office of the President. Created by Public Law 93-400 on August 30, 1974, it prescribed uniform procurement policy for all federal agencies toward six statutory goals: (1) uniform regulations, (2) criteria for soliciting viewpoints of interested parties in developing policies and regulations, (3) policy relating to reliance on the private sector to provide needed property and services, (4) promote and conduct research in procurement, (5) establish a Government-wide procurement data system and (6) recommend and promote programs for recruitment, training, career development and performance evaluation of procurement personnel.

State Law - In general, Federal procurement is subject only to Federal law and is unaffected by State or local law. In contrast, commercial contract formation and performance are governed by state law rather than Federal law. For example, subcontracts are generally subject to state law, not Federal law. One example of a state law, which has affected Federal procurement is the Uniform Commercial Code (UCC), which applies to commercial contracts for the purchase and sale of goods. The UCC has been adopted by all states except Louisiana and portions of the UCC are exempted in California. The UCC may be followed in Federal procurement cases involving the acquisition of commercial items or when there is no applicable Federal law. (The UCC is discussed at some length in the next chapter.) In addition, many state environmental laws are often applicable to the Federal Government and their contractors.

Acquisition Philosophy - Acquisition professionals are encouraged to seek practical solutions and take the best business approach in acquiring goods and services. FAR 1.102(d) states:

Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interest of the Government and is not addressed in the FAR nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, policy or procedure is a permissible exercise of authority.

Underlying Legal System

Common Law - As previously described, the term "common law" refers to law made by judges on a case-by-case basis in the absence of a statute which dictates a particular result in the case. The common law system originated in England before the American Revolution and continues to evolve today. Over this time, judges followed the rulings of other judges (a practice known as "stare decisis" -- let the decision stand), is a developing a body of laws, which were relied upon and followed in deciding factually similar cases. While statutes may overrule common law, many existing contracting rules, such as the requirements for an offer and acceptance, stem from the common law.

The common law system is adversarial in nature, meaning that the parties to a dispute initiate the litigation and have responsibility for pursuing it; the courts react to the litigation and have no power to initiate it. This system is used in 49 of the 50 states, England, Canada, Australia, and other English speaking countries. Another legal system known as "civil law" also exists. It was based on Roman law and also influenced by the Napoleonic Code, which was instituted by Napoleon at the beginning of the 19th Century. This system gives the courts a far more active role in litigation, courts having the power to initiate litigation and to present evidence in an inquisitorial manner. It relies on an extensive code of laws as opposed to "judge-made" law. This system is used in continental Europe, South America, Quebec and Louisiana.

In England, courts were traditionally divided into courts of law and courts of equity. Courts of law had rigid technical rules of procedure and were very limited in the type of remedy, which could be granted, being essentially only money damages. Courts of equity were alternative forums available to those who were unable to receive an adequate remedy in law. Examples of equitable remedies include court orders which: prohibit one from doing an act (injunction) or require one to perform an act (mandate); conform the language of a document to the wording actually intended by the parties (reformation); invalidate a contract (rescission); and require one contracting party to perform its obligation under the contract (specific performance). Generally, in United States courts, legal and equitable powers have been combined so that one court can grant either type of remedy.

Civil v. Criminal Law - In our legal system, another distinction must be made between civil and criminal actions. A civil action is a lawsuit brought by one party

against another party to recover compensation or enforce some private right. The party bringing the action (plaintiff) has the burden of establishing its right to recover by a preponderance of the evidence (more convincing to the trier of fact than the opposing evidence). The purpose is to compensate the plaintiff for defendant having violated a duty owed to the plaintiff. Breach of contract is an example of a civil action. Criminal action involves a prosecution, initiated by a governmental body against some person (the term includes corporations, considered to be legal persons) for having committed some act against the public. The prosecution has the burden of proving its case against the accused by evidence, which is beyond a reasonable doubt; the primary purpose of the prosecution is to punish the accused, not to compensate the victim.

Business Ethics and Standards of Conduct

Business Ethics - The term "business ethics" refers to the application of ethical values (discussed below) in making business decisions and taking actions in a business situation. It implies the application of a sense of right or wrong, based on personal or moral values, in pursuing a course of action. The law recognizes or establishes commonly accepted standards of conduct, which in turn reinforces community values. However, the law and business ethics are not co-extensive, such as where a business decision requires not only compliance with the law (statutes, regulations, etc.), but the exercise of discretion. For example, contracting officers are often required to exercise discretion in choosing among courses of action, which meet basic legal requirements. Some choices may be technically within the range of actions permitted by the law, but still be fundamentally unfair or otherwise violate ethical values. In some extreme situations, the mechanical application of a rule might even have such inappropriate consequences that compliance would be unethical. The objective is to exercise sound and ethical business judgment, informed by the applicable law.

5 C.F.R. PART 2635 - Regulations published by the Office of Government Ethics (OGE) pursuant to Executive Order 12674 established "Standards of Ethical Conduct for Employees of the Executive Branch," effective February 3, 1993. Its purpose was to "establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable." In addition to establishing uniform ethical standards of conduct, which supersede the regulations of individual agencies, it provides guidance in the interpretation and application of statutory requirements applicable to employees of the executive branch of Government. For example, it is particularly helpful in further defining terms used in those statutes such as "procurement function" and "personally and substantially." Those statutes are discussed below.

DoD Directive 5500.7-R, Joint Ethics Regulation - This DoD directive provides further guidance for 000 employees in implementing the OGE regulations. In addition, Chapter 12 of the directive describes various commonly accepted ethical values, and establishes a decision-making plan for using these values to arrive at ethical decisions (i.e., decisions which implement ethical values). The plan features a step-wise method for identifying the consequences of the various alternatives for the "stakeholders" (those who

are likely to be affected by the decision), and for identifying those alternatives, which have ethical implications. Unethical alternatives are eliminated, and ethical alternatives are preferred over "non-ethical" alternatives (which are neither ethical nor unethical). The ethical values and ethical decision-making model are set forth in Appendix of this book.

Conflict of Interest - Many fundamental ethical values may be implicated in the conduct of Government contracting personnel, such as honesty, integrity, loyalty, accountability, and several others, which imply ethical responsibilities. In fact, it is not unusual for decisions of the courts or administrative agencies to explain that they are applying the law in such a manner as to "protect the integrity" of the acquisition or procurement process. One obvious concern is the possibility that a gross failure of ethical responsibility, such as bribery or other corrupt practice, could interfere with the acquisition process; another important concern is that a lack of awareness of these responsibilities might cause contracting personnel not to recognize the creation of conflicting demands or loyalties which may interfere with the fulfillment of their ethical duties to the Government and the public interest they have committed to serve. Such a conflict is a "conflict of interest," and many such conflicts are specifically prohibited by statute or regulation.

Organizational Conflicts of Interest - The term "organizational" conflict of interest refers to a situation, in which a person may be unable to provide impartial advice or assistance to the Government, or the person's objectivity in performing a contract may be impaired, or the person has an unfair competitive advantage, because of that person's other activities or relationships. FAR § 9.501. For example, a contractor which prepared a statement of work for the Government's use in acquiring a system could have a strong competitive advantage in offering to supply that system to the Government; because that competitive advantage may not solely be the result of the contractor's expertise, the contractor is prohibited from supplying that system to the Government unless it is the sole source, or it participated in the development and design of the system, or more than one contractor was involved in preparing the statement of work. See FAR § 9.505-2 (b). The FAR (§ 9.508) provides various illustrations of situations involving possible organizational conflicts of interest. It is the contracting officer's responsibility to identify, avoid, and neutralize or mitigate significant conflicts. § 9.504. See, e.g., *J&E Associates*, 8-278771, 98-1 CPO ~ 77 (March 12, 1998).

Question: If a firm satisfactorily performs a contract to develop a plan, which later is used as a statement of work for another contract, could the contracting officer properly exclude the firm from consideration by the new contract on the grounds that there is a conflict of interest? See the case of *SSR ENGINEERS, INC.* at Vol 2.

Standards of Conduct - Many professions establish a "code of ethics" or a "code of professional responsibility" to articulate the members' ethical standards. Generally such codes actually establish standards of acceptable behavior, without regard to the member's own personal or cultural values. In some instances a member's deviation from accepted standards of behavior may result in exclusion from the profession, such as disbarment of an attorney for a serious breach of professional responsibility. As previously mentioned,

the Government has established such standards of conduct both by regulation (5 C.F.R. Part 2635 and the Joint Ethics Regulation) and by statute. There are a number of statutes, which govern the conduct of current and former federal employees in their dealings with each other and with Government contractors. These rules are not necessarily consistent, and compliance is not assured simply by applying common sense.

Procurement Integrity Act - The "Procurement Integrity Act" (41 U.S.C. § 423), as amended by section 814 of P.L. 101-189. One of the more complicated laws which has been amended numerous times since its initial enactment is the Procurement Integrity Act. It involves four types of activities. First, it requires any agency employee who is "personally and substantially" involved in a competitive agency procurement for noncommercial items that is expected to exceed the simplified acquisition threshold who has contact with a bidder/offeror regarding future non-federal employment or business opportunities to report the contact and either reject the employment or disqualify himself from further participation in the procurement. Employment discussions during such transactions at any dollar level also violate 18 USC § 208 (see below) and 5 CFR § 2635.603(b). An employee's participation in a procurement may be considered "personal and substantial" if it includes such activities as preparing or reviewing the specification or solicitation, evaluating bids or proposals, negotiating contracts, or reviewing and approving award.

Second, the Act prohibits a former Government official who played a key role in connection with certain contract actions exceeding \$10 million from accepting any compensation from a contractor as an employee, officer, director, or consultant of the contractor within a period of one year after the official: a) served at the time of selection as a procuring contracting officer, the source selection authority, a member of the source selection evaluation board, or the chief of a financial or technical evaluation team; b) personally made for the agency the decision to award the contract, subcontract, modification, task order, or payor settle a claim, approve insurance, or establish overhead rates for a contract which exceeded \$10 million; or c) served as the program manager or deputy, or administrative contracting officer, for a contract which exceeded \$10 million.

Third, the Act prohibits present or former Government officials or persons advising or acting for the Government from disclosing any contractor bid or proposal information before the award of a federal agency procurement contract to which the information relates. Fourth, the Act prohibits any person from knowingly obtaining source selection information or contractor bid or proposal information regarding a competitive procurement prior to award. Together these prohibitions address both ends of the improper transmission of this information.

A contractor's violation of any provision can result in a rejection of its proposal, cancellation of the procurement, denial of profit (or rescission of the contract) if the contract has been awarded, or any other contractual, administrative, civil, or criminal penalties in the interest of the Government. (FAR 3.104). The contracting officer must certify to the head of the agency that he or she has no information concerning any violation of the statute or disclose all information of a suspected violation. The text of

this statute is set forth in Appendix C.

Question: One of the two offerors for a multi-million dollar contract alleges that confidential information was leaked to the other offeror. What is the contracting officer to do? See *LORAL WESTERN DEVELOPMENT LABS* at Vol. 2.

18 U.S.C. §205 - This statute prohibits federal employees from acting as an agent or attorney (representing) anyone in a claim or other matter before a department or agency in which the United States has a direct and substantial interest.

Post-Employment Restrictions, 18 U.S.C. §207 - This statute contains three relevant limitations on the actions of *former* federal employees of the executive branch and military officers.

Lifetime Ban - There is a **lifetime** ban against acting in a representational capacity for anyone other than the United States in any formal or informal meeting with the Government regarding a matter in which one was **personally and substantially involved** while a federal employee. For example, if one was administering a contract with X Corporation, while he or she could later work for X, it could not involve representing X in meetings with the Government concerning this same contract.

Two-Year Ban – There is a **two-year** ban on acting in a representational capacity for anyone concerning a matter, which was under that person's **official responsibility** during the final year of federal employment. This prohibition does not require the same degree of involvement as the first, and its application is largely dependent on the extent of a person's supervisory responsibilities while a federal employee.

Senior Level Positions - A third prohibition applies only to certain senior level officers (0-7 or above), Senior Executive Service employees and certain lower grade officers in designated positions. It imposes a **one-year** ban on any attempts to influence, by any communication or appearance, employees of their former agency or department, concerning any particular matter pending before that department or in which that department has a substantial interest.

Conflict of Interest, 18 U.S.C. §208 - This law prohibits current federal employees and military officers, who in their official capacity participate personally and substantially in particular matters, from having a financial interest in or employment arrangement regarding that same matter. The law is designed to avoid the classic conflict between one's professional interest (ensuring that the Government receives what it bargained for) and one's personal interest. This prohibition also extends to the individual's spouse, minor child or business partner. So if one is administering a contract with X Corporation, he or she cannot own stock in X corporation, nor can one's spouse be employed by X Corporation, nor can one have an arrangement to return to work for X corporation after leaving federal service. One is said to have a financial interest in a company if negotiating for employment with that company. Title 18 U.S.C. §208(b) provides that these prohibitions will not apply where the employee or officer disqualifies

himself or herself from further official participation in the matter, or makes full disclosure of the financial interest and that interest is in a trust, mutual fund, or less than \$15,000 (5 CFR 2640.202).

Question: The new contractor hired the Contracting Officer's Technical Representative as its project manager as soon as he retired, one day after the contract was awarded. Is something wrong with this? See *Matter of: CREATIVE MANAGEMENT TECHNOLOGY, INC.* at Vol. 2.

18 U.S.C. §209 - This statute simply states that a federal employee may be paid for performing official duties only by the Government, not by any other private or public entity. This does not bar the receipt of remuneration from other sources, but prohibits such when acting in an official capacity. Violations of 18 U.S.C. §§205, 207, 208, and 209 can result in imprisonment for one year and a \$10,000 fine, or both, for each violation. Willful violations of these sections can increase the term of imprisonment to five years. Furthermore, 18 U.S.C. §216 provides that the Attorney General can initiate a civil action against anyone violating these sections, and upon proof of such misconduct by a preponderance of the evidence, the person may be fined as much as \$50,000 for each offense, or the amount received or offered for the misconduct, whichever is greater.

Unlawful Gratuities, 18 U.S.C. §201 - While 18 U.S.C. § 201 (c) prohibits public officials from soliciting or receiving something of value for or because of an official act, the Office of Government Ethics (OGE) Regulation has a "de minimis" exception which permits acceptance of unsolicited gifts, the retail value of which does not exceed \$20. Multiple gifts may also be accepted as long as their aggregate retail value does not exceed \$20 per occasion and \$50 per donor per calendar year. Gifts, other than cash or stock, having an aggregate value up to \$200, can be accepted if given for meritorious public service or achievement. On special occasions, such as aircraft rollouts or ship launchings which have been officially approved under the Joint Ethics Regulation, DOD employees participating in the event can accept gifts exceeding \$20 as long as the total value to a single family does not exceed \$100.